MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

United States of America	**D-_____**
v.	**Defense Motion for Article 5 Status Determination, or, Alternatively, Dismissal for Lack of Personal Jurisdiction**
Noor Uthman Muhammed	**10 March 2010**

1. **Timeliness:** This Motion is timely filed for hearing on 24 March 2010.

2. **Relief Sought**: On behalf of Noor, the Defense moves for a status determination as required by Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW), 6 U.S.T. 3316 and a hearing to determine whether the Commission can exercise personal jurisdiction over Noor pursuant to the Military Commissions Act of 2009. 10 U.S.C. § 948d.

3. **Overview**: Noor was apprehended in Pakistan after fleeing from Afghanistan, which at the time was a combat zone. Noor's capture occurred in the context of an international armed conflict between signatories to the GPW (the United States and Afghanistan). The United States participated in his capture and has held him in its custody for the last eight years as an "enemy combatant." There is sufficient doubt concerning Noor's status such that GPW Article 5 requires that he be afforded POW protections, at least until such time as a competent tribunal determines that he does not fall within any category of protected persons. The Military Commissions Act permits this determination to be made in conjunction with a pretrial jurisdictional hearing.

The Military Commissions Act of 2009 significantly amended its predecessor, particularly with respect to jurisdiction. The Act incorporates provisions of Article 4 of the GPW to define its jurisdiction and identifies the military commission as a competent tribunal to determine findings sufficient for jurisdiction. *See* 10 U.S.C. § 948a(6) and § 948d (2009).

Consequently, under international and the Military Commissions Act, the Commission must make a two-fold inquiry: 1) whether Noor is entitled to the protections of the GPW as a privileged belligerent; and 2) whether this Commission has personal jurisdiction over him. The Defense requests the Commission convene a pretrial hearing to resolve these issues, or alternatively, dismiss the charges for lack of personal jurisdiction.

4. **Burden and Standard of Proof:** The burden of proof is on the Prosecution to establish that the Commission has jurisdiction over Noor. Rule for Military Commission (RMC) 905(c)(2)(B).[1] The issue of status under the GPW is not only a jurisdictional prerequisite but could also form the basis for the affirmative defense of immunity based on privileged belligerency status.

The United States Court of Military Commission Review (CMCR) considered this issue in *United States of America v. Omar Ahmed Khadr*, No. 07-001 (C.M.C.R. 2007).[2] In this opinion, the CMCR indicates that the Prosecution must prove the absence of status beyond a reasonable doubt. While in general, "R.M.C. 905(c)(1) sets the [Prosecution's] burden on any factual issue necessary to resolve the motion [to dismiss] as a 'preponderance of the evidence,'" *Khadr*, CMCR 07-001 at 24 (quoting RMC 905(c)(1)), that general provision is superseded by a more specific requirement when, as here, the defense of lawful combatant status or similar immunity is raised. Noor has raised such a defense by asserting that he is within the categories of protected persons identified in GPW Article 4 and currently entitled to the protections of the GPW pursuant to Article 5. In such cases, the CMCR has instructed that:

> The burden of raising the special defense that one is entitled to lawful combatant immunity rests upon the individual asserting the claim. Once raised before a military commission, the burden shifts to the prosecution to prove *beyond a reasonable doubt* that the defense does not exist. R.M.C. 916(b). Determining lawful and unlawful combatant status under existing international treaties,

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[1] The Rules for Military Commission were promulgated to implement the Military Commissions Act of 2006. The Secretary of Defense has not issued new rules responsive to the 2009 amendments nor has he rescinded the existing rules, which, consequently, remain in effect at the time of this filing.

[2] *See,* Attachment A.

> customary international law, case law precedent (both international and domestic), and the M.C.A. is a matter well within the professional capacity of a military judge.

Khadr, CMCR 07-001 at 7 (emphasis added) (citation omitted).

Thus, when the issue is immunity due to lawful status-and those qualifying as POWs under the GPW must be deemed to have such status, the Military Judge must apply the higher standard of proof required by RMC 916(b), and the general "preponderance of the evidence" standard for factual issues prescribed by RMC 905(c)(1) does not apply. It may be that the other factual issues in connection with this motion need only be shown by a preponderance of the evidence at this pretrial stage (for example, the elements of the definition of "unprivileged enemy belligerent" set forth at 10 ISC § 948a(7), discussed below), although to be sure they would also need to be proven beyond a reasonable doubt to the members of the Commission at trial if they were elements of the crimes for which Noor is prosecuted. Furthermore, pre-trial factual findings made at the mere "preponderance" level could not be binding or dispositive at trial.

5. **Facts**:

a. Noor was apprehended in Faisalabad, Pakistan on 28 March 2002 by Pakistani police in conjunction with United States military and law enforcement agencies. At his Combatant Status Review Tribunal (CSRT), in October 2004, the Government provided a summary of evidence to justify Noor's continued detention as an "enemy combatant." The Government alleged that Noor was the "70th Taliban Commander" and further that the Khalden Camp was used to train members of the Taliban.[3]

b. Although a CSRT determined that Noor is an "enemy combatant," no competent tribunal has determined whether he is entitled to Enemy Prisoner of War Status or whether he meets the jurisdictional definition of "unprivileged enemy belligerent." 10 U.S.C. § 948a(7).

[3] The Combatant Status Review Tribunal Summary of Evidence is attached at Tab C.

c. On 9 January 2009, the current charges against Noor were referred for trial by military commission and Noor was arraigned on 14 January 2009. The charges allege that Noor is "a person subject to trial by military commission as an *alien unlawful enemy combatant*" (emphasis added). *See* Charge Sheet, referred 9 January 2009.

6. **Law and Argument**:

International law and the Military Commission Act, as amended, compel the Commission to convene a pretrial hearing to determine Noor's status and the Commission's jurisdiction to try him. The structure of the Military Commissions Act's definitional section, § 948a, effectively provides for the equivalent of an Article 5 status hearing, whereas § 948b establishes the limited jurisdiction of the military commission. The Act defines the term "privileged belligerent" as "an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War." 10 U.S.C. § 948a(6). The jurisdiction of military commissions is confined to the trial of "alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission." 10 U.S.C. § 948b(a).

The Articles 4 and 5 of the GPW were adopted after World War II to mitigate harsh treatment of combatants and noncombatants at the hands of their captors. Articles 4 and 5 establish a framework that requires persons captured on the battlefield be categorized as prisoners of war (soldiers or other meriting this designation) or civilians, and accorded protections established by the Conventions for each group. An additional group, compromised of persons who fall outside these categories, consisting of certain civilians who have taken up arms, or soldiers who lose their privileged status through the commission of recognized war crimes, has been described as "unprivileged belligerent." Specifically, Article 4 enumerates eight categories of individuals, who if captured, meet the definition of prisoner of war. As noted above, the Military Commissions Act incorporates these categories in its definition of "privileged enemy belligerent." 10 U.S.C. § 948a(6).

If a captured person asserts that they are not correctly categorized under Article 4, or that they are a noncombatant civilian, GPW Article 5 provides:

> The present Convention shall apply to the persons referred to in Article 4 from the time that they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

GPW Article 5.

Notwithstanding the United States' ratification of this Convention, in February 2002, the President issued a Memorandum stating that "none of the provisions of Geneva apply, and that detainees captured in the Global war on Terrorism (GWOT) are unlawful combatants and, therefore, do not qualify as prisoners of war."[4] Consequently, no detainees were given Article 5 hearings, and their legal status remains in doubt.

Although the Military Commissions Act incorporates the GPW's definitions of Prisoners of War, it does not explicitly require a hearing to resolve the question of status but permits the Commission to make findings sufficient for jurisdiction. The 2009 Amendments to the Act, including the incorporation of Article 4 and the elimination of § 948b(g), prohibiting unlawful enemy combatants from invoking the Geneva Conventions as a source of right, demonstrate an intent to comply with the Conventions on this particular issue. Consistent with Article 5, this hearing should be held as soon as possible. Further, the interests of judicial economy are served by a prompt determination of jurisdiction prior to the expenditure of additional resources that may prove to be unnecessary.

The hearing should determine both jurisdiction and status. This can be accomplished by requiring the Prosecution to present evidence and prove by a preponderance of the evidence[5] that

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[4] Memorandum of the President, *Humane Treatment of al Qaeda and Taliban Detainees*, dated 7 February 2002.

[5] The Defense intends to file a Motion to Dismiss Based on a Lack of Personal Jurisdiction prior to this hearing in support of its position that Noor does not meet any of the three statutory categories defining unprivileged enemy belligerents. The issue of whether Noor can assert the

Noor is not a privileged enemy belligerent as defined by Article 4 of GPW **and** meets one of the three statutory criteria necessary for establishing that he is an "alien unprivileged enemy belligerent." As at any motions session, the Defense must be provided the opportunity to test the Government's evidence and provided the opportunity to present its own evidence and argument. The Commission must then enter findings sufficient to establish jurisdiction.[6]

At the first opportunity, Noor challenged his detention and he continues to assert that there is sufficient doubt regarding his status to require resolution by an Article 5 tribunal or by the Commission acting as its equivalent, which may simultaneously decide whether Noor falls within its limited jurisdiction.

7. **Request for Oral Argument:** The Defense requests oral argument and an evidentiary hearing.

8. **Conference with Opposing Counsel**: On 8 March 2010, the Defense conferenced with the Prosecution; the Prosecution opposes the requested relief.

9. **Attachments:**

A. *United States v. Omar Khadr*, No. 07-001 (C.M.C.R. 2007).

B. *United States v. Salim Ahmed Hamdan*, Ruling Article 5 Status Determination (17 December 2007) and *United States v. Salim Ahmed Hamdan*, Ruling Motion to Dismiss Personal Jurisdiction (19 December 2007).

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defense of immunity based on privileged belligerent status is distinguishable from a failure of proof. Once the affirmative defense is raised, the Prosecution must disprove it beyond a reasonable doubt.

[6] In *United States v. Salim Ahmed Hamdan,* the Commission, interpreting the 2006 MCA, made two rulings; one regarding Mr. Hamdan's status and a second addressing the Commission's jurisdiction over Mr. Hamdan. Although obviously not binding, these decisions are instructive regarding the necessity for, and conduct of, hearings to resolve these distinct issues but interrelated issues.

C. Combatant Status Review Tribunal, Summary of Evidence, *Noor Uthman Muhammed* (19 October 2004).

Respectfully submitted,

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MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA	**D-018**
v.	**Government Response to Defense Motion for Article 5 Status Determination, or, Alternatively, Dismissal for Lack of Personal Jurisdiction**
NOOR UTHMAN MUHAMMED	**17 March 2010**

1. **Timeliness.** This response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.6.b and the Commission's scheduling order. The Defense motion was received on 10 March 2010.

2. **Relief Requested.** The Defense motion should be denied at this stage of the proceedings, although the Government does not oppose holding a preliminary jurisdictional hearing at a time that maximizes judicial economy—such as immediately prior to trial on the merits—in light of the logistical and evidentiary issues involved with conducting the hearing and trial separately. Other aspects of the Defense motion should be denied, such as the novel standard of proof the Defense seeks for such a well-settled preliminary jurisdictional determination.

3. **Overview.** The Government agrees that the amended Military Commissions Act of 2009, 10 U.S.C. § 948a *et seq*. ("MCA"), specifically grants this Commission's presiding Military Judge the authority "to make a finding sufficient for jurisdiction." 10 U.S.C. § 948d. In light of the amended MCA's jurisdictional language, such a finding would be equally sufficient to satisfy any applicable requirements under Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War ("GPW"), 6 U.S.T. 3316.[1] The applicable authority holds that

[1] Although, as explained *infra*, particularly since the MCA subsumes the issues contemplated by GPW Article 5, there is no further requirement imposed by Article 5 that the MCA does not itself address.

such a finding, as with any preliminary judicial determination of jurisdiction, may be rendered by the Military Judge based on a preponderance of the evidence. *See* R.M.C. 905(c)(1). The Government does not agree with the necessity of making such a jurisdictional finding at this early stage, which would be more appropriately rendered contemporaneous with evidence adduced on the merits, and requests that any preliminary hearing on this issue be held in a time and manner that best comports with judicial economy, such as immediately prior to trial on the merits.

4. Burden and Standard of Proof. The Government bears the burden of persuasion on a motion to dismiss for lack of jurisdiction. *See* R.M.C. 905(c)(2)(B). Should the Military Judge grant a preliminary jurisdictional hearing, the Government's burden of proof would be by a preponderance of the evidence. R.M.C. 905(c)(1).

Contrary to the Defense's assertion, the normal preponderance-of-evidence standard on this issue was in no way "superseded" by the United States Court of Military Commission Review's decision in *United States v. Khadr*, No. 07-001 (C.M.C.R. 2007), which served only to reinforce that the presiding military judge in a military commission is capable of deciding such preliminary jurisdictional questions—a power now explicitly codified under the amended MCA. 10 U.S.C. § 948d. The applicable commission rules squarely delineate that the standard of proof for such preliminary determinations is by a preponderance of the evidence. R.M.C. 905(c)(1) ("Unless otherwise provided in this Manual, the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a *preponderance of the evidence*.") (emphasis added); *accord Khadr*, 07-001 at 24 ("R.M.C. 905c(2)(B) assigns the burden of persuasion to the prosecution on a motion to dismiss for lack of jurisdiction; R.M.C.

905c(1) sets that burden on any factual issue necessary to resolve the motion as „a *preponderance of the evidence*.'") (emphasis added).

Should the Defense subsequently decide to raise combatant immunity as a "special defense," *Khadr*, CMCR 07-001 at 7—as, for example, by asserting that the Accused was a lawful combatant at the time of one or more of the charged offenses—the Government would then bear the additional burden of disproving that defense (and other defenses raised), if applicable,[2] to the *trier of fact* beyond a reasonable doubt. *See* R.M.C. 916(b). Contrary to the Defense's conception, however, the time to raise such an issue as an *affirmative defense* to the charges is (as with any other defense) *at trial*, not at a preliminary hearing before the Military Judge. What has been raised by the instant motion is the preliminary question of whether the Commission has personal jurisdiction over the Accused, an issue that can be resolved by the Military Judge (at whatever stage of the proceedings is deemed necessary) based on a preponderance of the evidence.

5. Facts. Since the motion at this point addresses only the legal issue of whether a jurisdictional hearing should be granted, no facts are necessary for its resolution; however, the Government agrees that the Defense has sufficiently raised the issue of the Accused's status so as to challenge the Commission's jurisdiction over him.

6. Law and Argument

The Government agrees that the amended MCA of 2009 effectively incorporates GPW Article 4 into its jurisdictional definitions of "privileged" and "unprivileged belligerents." 10 U.S.C. § 948a(6)-(7). For that reason, a preliminary jurisdictional finding made by the Military

[2] The Government does not concede that combatant immunity is a defense to war crimes, which may be charged against even *privileged* belligerents (albeit at a different a forum). Resolving this larger issue, however, is not necessary to resolve the motion at hand.

Judge would also comport with GPW Article 5, which addresses how detaining powers in international armed conflicts should go about determining whether captured belligerents fall into one of the protected categories delineated under GPW Article 4.[3] Therefore, irrespective of whether the Accused can actually claim GPW Article 5 as a source of rights, *see infra*, a judicial finding regarding personal jurisdiction under the MCA would necessarily determine whether the status of the Accused falls within GPW Article 4, which would effectively satisfy any lingering issue under GPW Article 5.

There is, then, no requirement that a separate GPW Article 5 hearing be convened, even if jurisdiction is challenged. Jurisdiction in this case is governed by statute—the MCA—not GPW or any other international treaty or agreement. 10 U.S.C. § 948d. Even if GPW required the United States to afford the Accused a GPW Article 5 hearing, Congress always retains the authority to abrogate or repeal a treaty by a later-enacted statute. *See, e.g.*, *Edye v. Roberston (Head Money Cases)*, 112 U.S. 580, 599 (1884); *see also Reid v. Covert*, 354 U.S. 1, 18 (1957) ("This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."). Nor does any provision of customary international law prohibit Congress from so acting.[4] Thus,

[3] The Military Judge on this Commission is certainly a "competent tribunal" under Article 5 to make this determination. GPW's drafters considered requiring the Article 5 status inquiry to be made by the same "military tribunal" qualified to mete out criminal punishment for war crimes. *See* International Committee of the Red Cross, III *Commentaries on the Geneva Conventions* at 77 (J. Pictet, gen. ed. 1960). Negotiators ultimately decided to adopt the more flexible term "competent tribunal," but harbored no doubt that a military commission convened for imposing criminal sanctions would meet this standard. *See id.*

[4] *See, e.g.*, *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 302 (D.C. Cir. 2005) ("Never does customary international law prevail over a contrary federal statute."); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) ("[C]lear congressional action trumps customary international law and previously enacted treaties."); *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988) ("Statutes inconsistent with principles of customary international law may well lead to international law violations. But within the domestic legal realm, that inconsistent statute simply modifies or supersedes customary international law to the extent of the inconsistency.").

even if Article 4 and Article 5 of the GPW were somehow in tension with the MCA (which they are not), the MCA would remain lawful and enforceable, notwithstanding anything in the Geneva Conventions or any other earlier-enacted treaty to the contrary.

Moreover, contrary to the Defense's suggestion, GPW is not enforceable through individual claims. A treaty constitutes "a compact between independent nations" and its enforcement depends "on the interest and the honor of the governments which are parties to it." *Head Money Cases*, 112 U.S. at 598. Importantly, a treaty is not binding on domestic law unless Congress has enacted statutes implementing it or "the treaty itself conveys an intention that it be „self-executing' and is ratified" on that basis. *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (citing *Iguarta-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005)). Thus, the proper resolution of any alleged treaty violation is through "international negotiations and reclamations," not court action. *Head Money Cases*, 12 U.S. at 598.

Even "when treaties are self-executing," the legally binding "presumption is that international agreements, even those directly benefiting a private person, generally do not create private rights or provide for a private cause of action in domestic courts." *Medellin*, 522 U.S. at 506 n.3 (citing 2 Restatement (Third) of Foreign Relations Law of the United States, § 907 cmt. a (1986)). Indeed, the United States Circuit Courts of Appeals have overwhelmingly held that unless the treaty expressly grants enforcement of its provisions to individuals, or Congress passes legislation granting a right to judicial enforcement, the treaty does not create privately enforceable rights.[5] Accordingly, the Accused is not entitled to any remedy before this Commission under GPW Article 5.

[5] *See, e.g., United States v. Emuegbunam*, 268 F.3d 377, 389 (6th Cir. 2001); *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001); *United States v. Li*, 206 F.3d 56, 60-61 (1st Cir. 2000); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992); *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3rd Cir. 1979).

Be that as it may, primarily, what the Government disputes regarding the Defense's motion (other than the aforementioned inaccuracy of its asserted standard of proof) is that it asks the Military Judge to make such a jurisdictional finding now, as opposed to a point closer in time to trial on the merits. Since the evidence with which the Government will prove jurisdiction largely overlaps its proof on the merits,[6] judicial economy weighs in favor of holding one trial, not two, or at least holding one right after the other, so as to conserve time, resources, and travel costs for the numerous witnesses, court staff, and counsel associated with this case. In light of the properly sworn and referred charges,[7] the Commission already has *prima facie* personal jurisdiction over the Accused. *See* R.M.C. 202(c) ("The jurisdiction of a military commission attaches upon the swearing of charges."); *accord U.S .v. Khadr*, CMCR 07-001 at 21. While the Defense's motion to dismiss for lack of jurisdiction may trigger a need to address this issue at some point prior to trial, *see id.*, the Defense cites no authority for the proposition that such a preliminary hearing may not be held, for example, immediately prior to trial, such that vast amounts of witnesses and evidence need not be produced on two separate occasions in

[6] As may be noted in the Government's Bill of Particulars, filed 25 January 2010, a central aspect of the alleged basis for jurisdiction is that the Accused purposefully and materially supported hostilities against the United States. Proving personal jurisdiction over the Accused is therefore substantially similar in many respects to proving the charges and specifications, which allege that the Accused materially supported terrorism and conspired with others to support terrorism and commit other war crimes.

[7] While the jurisdictional language under the amended Military Commissions Act (M.C.A.) of 2009 ("alien unprivileged enemy belligerent") is slightly different than the jurisdictional language by which the Accused was originally charged under the M.C.A. of 2006 ("alien unlawful enemy combatant"), the underlying substance of the Commission's jurisdiction over the Accused has not changed. In light of the amended jurisdictional language under the M.C.A. of 2009, the Government intends to request minor changes in the charge sheet at the next commission proceeding. *See* M.C.A. of 2009, Pub. L. No. 111-84, § 1804(c)(2), 123 Stat. 2612 (2009) ("[A]ny charges or specifications [sworn or referred under the M.C.A. of 2006] may be amended, without prejudice, as needed to properly allege jurisdiction under [the M.C.A. of 2009] and crimes triable under such chapter.").

Guantanamo Bay during a period in which the United States is engaged in an ongoing, overseas armed conflict.[8]

For the foregoing reasons, the Defense motion for a preliminary jurisdictional hearing should be denied at this stage; or, in the alternative, such a hearing should be scheduled to coincide with or immediately precede the Government's presentation of its case in chief.

7. **Oral Argument.** The Government respectfully requests oral argument.

8. **Witnesses and Evidence.** None

9. **Additional Information.** None

10. **Attachments.** None

Respectfully submitted,

By: _____//s//_____
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[8] While M.C.R.E. 104(a) does not on its face lower the evidentiary threshold for preliminary jurisdictional determinations, should the Military Judge decide to hold a preliminary jurisdictional hearing well in advance of trial, as requested by the Defense, a potential way to alleviate the burden on the Government's wartime resources, and promote judicial economy, would be to relax the rules of evidence applicable to such a hearing.